OPINION OF ADVOCATE GENERAL MENGOZZI

delivered on 28 February 2008 [1]

1. By the present reference for a preliminary ruling, the referring court is essentially asking the Court to determine whether, by virtue of the reference made by Regulation No 615/98 [2] to Directive 91/628, [3] the specific provision in Chapter VII 48 point 7(b) of the annex to that directive which applies to the transport of animals by ferry on a link between two points of the Community applies analogously in the case of transport of animals by 'roll-on/roll-off' ferry to a third State and how that provision is to be interpreted with particular reference to whether or not provision must be made for an interval of rest after 14 hours of transport by sea. If the answer to the first question is in the negative, the Court is also asked to determine whether, under Chapter VII 48 point 7(a) of the annex to the directive, a further 29 hours of transport by road may begin after the transport by sea without providing for the animals to be unloaded and rested for at least 24 hours first. Lastly, the national court wonders about the detailed rules for drawing up the route plan referred to in Article 5A point 2(d)(ii) of the directive and in particular whether a pre-typed statement indicating the care to be given to the animals on the ferry is sufficient for that purpose.

I — Legal framework

2. Under the second subparagraph of Article 13(9) of Council Regulation (EEC) No 805/68 of 27 June 1968 on the common organisation of the market in beef and veal, [4] as amended by Regulation No 2634/97, [5] the payment of the refund for exports of live animals is to be subject to compliance with the provisions established in Community legislation concerning animal welfare and, in particular, the protection of animals during transport. The second subparagraph of Article 33(9) of Council Regulation (EC) No 1254/99 of 17 May 1999 on the common organisation of the market in beef and veal, [6] which replaced Regulation No 805/68 on 1 January 2000, reproduces the provision

1 — Original language: Italian.

2 — Commission Regulation (EC) No 615/98 of 18 March 1998 laying down specific detailed rules of application for the export refund arrangements as regards the welfare of live bovine animals during transport (OJ 1998 L 82, p. 19).

3 — Council Directive 91/628/EEC of 19 November 1991 on the protection of animals during transport and amending Directives 90/425/EEC and 91/496/EEC (OJ 1991 L 340, p. 17), as amended by Council Directive 95/29/EC of 29 June 1995 (OJ 1995 L 148, p. 52). That directive was repealed by Council Regulation No 1/2005 of 22 December 2004 on the protection of animals during transport and related operations and amending Directives 64/432/EEC and 93/119/EC and Regulation (EC) No 1255/17 (OJ 2005 L 3, p. 1). However, Article 33 of that regulation provides that the directive is to be repealed only from 5 January 2007.

4 — OJ English Special Edition 1968 (I), p. 187.

5 — Council Regulation (EC) No 2634/97 of 18 December 1997 amending Regulation (EEC) No 805/68 on the common organisation of the market in beef and veal (OJ 1997 L 356, p. 13).

6 — OJ 1999 L 160, p. 21.

contained in the second subparagraph of the aforesaid Article 13(9) word for word.

3. The detailed rules for the application of Regulation No 805/68 are laid down in Regulation No 615/98.

4. Article 1 of that regulation specifies that the payment of export refunds for live bovine animals is to be subject to compliance, during the transport of the animals to the first place of unloading in the third country of final destination, with Directive 91/628.

5. Under Article 2 of Regulation No 615/98, checks on the animals must be carried out at the exit point from the customs territory of the Community. Article 2(3) of the regulation provides that an official veterinarian appointed by the competent authority of the State from which the animals have come, is to verify and certify that (a) the animals are fit for the intended journey in accordance with the provisions of Directive 91/628, (b) the means of transport by which the live animals leave the customs territory of the Community complies with the provisions of that directive, and (c) provisions have been made for the care of the animals during the journey in accordance with that directive.

6. Directive 91/628 establishes the criteria that Member States must follow for the protection of animals during transport.

7. It should be noted that for the purposes of the directive 'transport' means any movement of animals, effected by a means of transport, which involves loading and unloading the animals, and 'rest period' means a continuous period in the course of a journey during which animals are not being moved by a means of transport.

8. Under Article 5A point (2)(d) of Directive 91/628, Member States are required to ensure that the transporter ensures that the original copy of the route plan referred to in Article 5A point (2)(b) of the directive states the times and places at which the animals transported have been fed and watered during the journey and that the staff in charge of the transport ensure that the times and places are stated in the route plan.

9. Chapter VII 48 of the annex to the abovementioned directive indicates the watering and feeding intervals, journey times and rest periods that must be observed during the transport of live animals. Under Chapter VII 48 point 2, journey times may not, in principle, exceed eight hours unless the transporting vehicle meets the requirements referred to in point 3. In the case of transport of bovine animals, Chapter VII 48 points 4(d) and 5 establish a rule (the '29-hour rule') according to which animals must, after four-

teen hours of travel, be given a rest period of at least one hour, during which they must be given liquid and if necessary fed, after which they may be transported for a further fourteen hours; they must then be unloaded, fed and watered and be rested for at least twenty-four hours. [7]

10. Chapter VII 48 point 7 of the annex to the directive contains the following provision on transport by sea:

'(a) Animals must not be transported by sea if the maximum journey time exceeds that laid down in point 2, unless the conditions laid down in points 3 and 4, apart from journey times and rest periods, are met.

(b) In the case of transport by sea on a regular and direct link between two geographical points of the Community by means of vehicles loaded on to vessels without unloading of the animals, the latter must be rested for 12 hours after unloading at the port of destination or in its immediate vicinity unless the journey time at sea is such that the voyage can be included in the general scheme of points 2 to 4'.

7 — In fact, the '29-hour rule' represents an inaccurate interpretation of Chapter VII 48 point 4(d) which establishes that in the course of a journey which may last for a maximum of 28 hours, there must be a rest lasting for a minimum of at least one hour. It follows that the 29-hour rule does not define the maximum but the minimum journey time.

II — Facts, reference for preliminary ruling and procedure before the Court

11. On 23 October 2002, Schwaninger Martin submitted to the Zollamt Salzburg, Erstattungen (Salzburg customs office/refunds) a declaration concerning the export of 33 bovine animals to Albania and an application for an export refund on the consignment. It appears from the order for reference that the animals in question were first transported for 14 hours by road from Austria to Trieste (Italy), where they were unloaded and rested for 24 hours, and that they then continued the journey to Albania by lorry loaded onto a roll-on/roll-off ferry. The crossing to Durres (Albania) lasted 41 and a half hours and was immediately followed by a four-and-half hour journey by road to Lushnja (Albania), the final destination where the animals were unloaded after travelling for 46 hours in all.

12. The Salzburg customs office rejected the application for an export refund submitted by Schwaninger Martin since it considered that the transport in question had been effected by the latter in breach of the Community rules on the protection of animals, in particular the provisions of Directive 91/628 on the intervals at which animals are to be fed and watered in the course of journeys by sea. It pointed out that, in fact, the route plan submitted by the applicant did not contain any statements in relation to the intervals at which the animals were fed and watered during the journey by sea or any indication as to who was in charge of feeding and watering them and it therefore assumed that

the animals transported had neither been fed nor watered for a period of 46 hours. It also considered that a subsequent affidavit submitted by the driver and containing details of the times at which the animals were fed and watered during the ferry journey was irrelevant in this connection.

13. Schwaninger Martin brought an appeal against the Salzburg customs office's decision to reject its application before the Unabhängiger Finanzsenat (Independent Finance Tribunal) which, having doubts as to the interpretation of the relevant Community legislation, decided to stay the proceedings pending before it and refer the following questions to the Court for a preliminary ruling:

'(1) Is Article 1 of Commission Regulation (EC) No 615/98 of 18 March 1998 to be understood as meaning that Chapter VII 48 point 7(b) of the annex to Directive 91/628/EEC of 19 November 1991 applies analogously in the case of transport by sea on a regular and direct link between a geographical point of the Community and a geographical point in a third country by means of vehicles loaded onto vessels without unloading of the animals?

(2) If question one is answered in the affirmative, is Chapter VII 48 point 7(b) of the annex to Directive 91/628/EEC to be understood as meaning that, in the case of transport of bovine animals, the journey time by sea does not comply with the rule in point 4(d) if, after 14 hours of travel, the animals are not given a rest period of at least one hour?

(3) If question one is answered in the negative, is the then applicable provision in Chapter VII 48 point 7(a) of the annex to Directive 91/628/EEC to be understood as meaning that the journey time by sea on a regular and direct link between a geographical point of the Community and a geographical point in a third country by means of vehicles loaded onto vessels without unloading of the animals is immaterial provided that the animals are regularly fed and watered and, in such a case, does a further period of 29 hours of transport by road begin immediately after unloading the lorry at the port of destination?

(4) If question three is answered in the affirmative, is the first indent of Article 5A point 2(d)(ii) of Directive 91/628/EEC to be understood as meaning that the staff in charge of the transport are required to state in the route plan the times at which the animals transported were fed and watered during the ferry journey and that a pretyped statement indicating that 'during the ferry journey, animals are fed and watered in the evenings and mornings, at midday, and in the evenings and mornings' does not meet the requirements of

Directive 91/628/EEC, with the effect in law that the failure to state the measures actually taken to care for the animals leads to a loss of the right to an export refund in so far as the proof required cannot be provided by any other means?'

14. In accordance with Article 23 of the Statute of the Court, Schwaninger Martin, the Belgian and Austrian Governments and the Commission submitted written observations. Schwaninger Martin, the Greek government and the Commission were represented at the hearing.

III — Legal analysis

A — *The first question*

15. By the first question, the referring court is essentially asking the Court to determine the scope of the reference made by Regulation No 615/98 to Directive 91/628 and in particular whether, by virtue of that reference, the express provision in Chapter VII 48 point 7(b) of the annex to that directive which applies to transport by ferry on a regular and direct link between two geographical points of the Community applies analogously in the case of transport by ferry to a third country.

16. Before passing to the analysis of the question, I think it is advisable to recall briefly, in some detail, the legislative context in which it was raised.

17. It should be noted first that under Article 1 of Regulation No 615/98 the granting of export refunds is subject to compliance, during the transport of the animals to the first place of unloading in the third country of final destination, with the Community rules on the protection of animals, in particular the rules referred to in Directive 91/628 and especially the provisions contained in Chapter VII of the annex to that directive on maximum journey times and rest periods to be observed during transport.

18. In general, bovine animals may be transported for eight hours except in cases where certain requirements are met relating to the means of transport and designed to ensure the welfare of the animals transported — Chapter VII 48 point 3 of the annex to the directive — in which case the journey may last twenty-nine hours with a rest period of at least one hour during which the animals must be fed and watered.

19. In the case of transport by sea, Chapter VII 48 point 7(a) of the annex to the directive provides that the maximum journey time is to be eight hours unless the means of transport complies with the requirements laid down in point 3, in which case it is no longer necessary to meet the conditions relating to journey times and rest periods. However, where intra-Community transport by sea is effected by means of roll-on/roll-off ferries, Chapter VII 48 point 7(b) provides that there must be a rest period of twelve hours at the port of destination if the journey time exceeds the journey times specified in points 2 and 4(d) (eight hours and twenty-eight hours respectively).

20. The referring court asks the Court to determine which of the two cases referred to in Chapter VII 48 point 7(a) and (b) of the annex to Directive 91/628 applies to transport, as in the present case, in a lorry loaded onto a ferry on a regular link between a point of the Community and a third country. The referring court, while noting that on the basis of the wording of Chapter VII 48 point 7(b) that provision is not applicable to transport other than Community transport, nevertheless considers that the scope of the article in question may be extended by virtue of the reference made by Regulation No 615/98 to Directive 91/628, which requires compliance with the provisions of the directive during the transport of the animals to the first place of unloading in the third country of final destination.

21. In my view, that interpretation is inadmissible for various reasons.

22. In the first place, as the Commission has pointed out, in addition to the clear wording of Chapter VII 48 point 7(b) of the annex to Directive 91/628 according to which transport by ferry outside the Community does not fall within the scope of that provision, there is also the fact that while it is true that for the purposes of granting export refunds Article 1 of Regulation No 615/98 extends compliance with the provisions of Directive 91/628 in the phases of transport of animals 'to the first place of unloading in the third country of final destination', nevertheless that regulation does not contain any specific provision on the detailed rules whereby the provisions of the directive, which refer explicitly to intra-Community transport, are to apply equally under the regulation to transport to third countries.

23. It should be noted in this connection that, although the analogous application of the provisions laid down in Chapter VII 48 point 7(b) of the annex to Directive 91/628 to extra-Community transport would help to achieve the specific objective of protecting animals, referred to in Regulation No 615/98, by securing an equal level of protection in both Community and extra-Community transport, nevertheless such an extension of the rules would entail cooperation on the part of third countries which would have to ensure that the infrastructures and the hygiene facilities required under the Community legislation to ensure the welfare of the animals were available in the ports of destination in those countries. That is incompatible with compliance with the principle of sovereign equality of States on which international relations are based.

24. The analogous extension proposed by the referring court is therefore precluded by the requirement to comply with the principles of international law and, in particular, by the legal impossibility of imposing the application of Community rules outside 'Community territory'. [8] It is not to be supposed that the Community legislature, in requiring compliance with the provisions of Directive 91/628 for the purposes of export refunds through the reference made to that directive by Article 1 of Regulation No 615/98, intended to go against those principles and that legal impossibility.

25. The interpretation of the combined provisions of Article 1 of Regulation No 615/98 and Chapter VII 48 point 7(b) of the annex to Directive 91/628 proposed by the national court must therefore be ruled out as being contrary to the precepts in the preceding paragraph.

26. Moreover, an analogous extension of the specific rules laid down in Chapter VII 48 point 7(b) of the annex to Directive 91/628 is also unnecessary in the light of the fact that there is no gap to be filled in the rules at issue with respect to the case of transport by roll-on/roll-off ferry to a third country: in that case, the general provisions on transport by sea laid down in point 7(a) apply. The transport of lorries by ferry, while it has certain peculiarities, is still classifiable as transport by sea and this is confirmed both by the fact that point 7(b) speaks of 'transport by sea' in the case of transport by ferry and, above all, by the fact that in Chapter I 26 of the annex to the directive in question the legislature, in laying down rules on means of transport, included this type of ferry among means of transport *by water* [9] and specifically provided in point (b) that in the case of this type of transport: '(i) the animals' compartment shall be properly fixed to the vehicle; the vehicle and the animals' compartment shall be secured fast to the ship. On a covered deck of a roll-on/roll-off vessel, sufficient ventilation for the number of vehicles transported must be maintained. Where possible, a vehicle for the transport of animals should be placed near a fresh air inlet; (ii) the animals' compartment shall have a sufficient number of vents or other means of ensuring that it is adequately ventilated, bearing in mind that the air flow is restricted in the confined space of a ship's vehicle hold. There must be sufficient room inside the animals' compartment and at each of its levels to ensure that there is adequate ventilation above the animals where they are in a naturally standing position; (iii) direct access must be provided to each part of the animals' compartment so that the animals can, if necessary, be cared for, fed and watered during the voyage' (conditions which the order for reference suggests may have been complied with in the present case, inasmuch as it states on page 15 of the original text that the vehicles in which the animals were loaded

8 — On the principle of territoriality, see Joined Cases 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85, *Ahlström Osakeyhtiö* v *Commission* [1988] ECR 5193, paragraph 18. See also Case C-286/90 *Poulsen and Diva Navigation Corp.* [1992] ECR I-6019.

9 — See also, to the same effect, Commission communication AGRI H4/MR D (2003) 18791 of 22 July 2003.

met the 'additional conditions' laid down in Chapter VII 48 point 3 of the annex to Directive 91/628).

27. The absence of a gap in the rules also corroborates the solution I propose inasmuch as the very existence of rules applicable to cases such as the present one ensures that the objective of protecting the animals transported is achieved and therefore, contrary to what the Belgian Government maintains, prevents the reference to compliance with the provisions of Directive 91/628 made by Article 1 of Regulation No 625/98 from being rendered ineffective. [10]

28. In the light of the foregoing considerations, I propose that the Court reply to the first question raised by the referring court to the effect that the specific provisions of Chapter VII 48 point 7(b) of the annex to Directive 91/628 which refer exclusively to transport by ferry on a regular link between two points of the Community cannot apply analogously to the transport of animals by roll-on/roll-off ferry to a third country.

10 — On the need to interpret provisions of Community law so as to ensure that they retain their effectiveness, see in particular Case C-434/97 *Commission* v *France* [2000] ECR I-1129, paragraph 21, and Case C-403/99 *Commission* v *Italy* [2001] ECR I-6883, paragraph 28.

B — *The second question*

29. On the basis of the answer to the first question given above, there is no need to answer the second question referred to the Court by which the national court seeks to ascertain the detailed rules for the application of Chapter VII 48 point 7(b) of the annex to the directive to transport by sea by roll-on/roll-off ferry to an extra-Community destination.

30. I shall nevertheless examine that question in case the Court considers that the abovementioned Chapter VII 48 point 7(b) is applicable to extra-Community transport by sea by ferry.

31. In particular, the national court wants to know whether, under Chapter VII 48 point 7(b) and point 4(d), to which that provision refers, in a journey of 29 hours by roll-on/roll-off ferry there must be a rest period of 1 hour after the first 14 hours of travel.

32. In my view, that question should be answered in the negative.

33. Apart from the practical difficulties a ferry would encounter in complying with the obligation to dock at or near a port in order to give the animals a rest period, in interpreting the rules in question the purpose of those rules must also be taken into account and, in particular, the principal function of the rest period of at least one hour prescribed in Chapter VII 48 point 4 of the annex to the directive, referred to in point 7 of that chapter, and the consequent absence of any real need for such a rest period in the context of transport by sea by ferry.

34. It should be noted that the purpose of the rest period in question of at least one hour is in fact to enable the transporter to give the animals the necessary care in terms of hygiene, food and water. However, while it is clear that the vehicle has to stop for these operations in the case of transport by road, this does not apply in the case of transport by ferry where, as indicated in paragraph 26 above, the animals can and must be fed and watered during transport. Moreover, in the case of transport by ferry, although the animals are in a lorry it is to be supposed that they are not subjected to the shaking and jolting associated with transport by road and that, in this respect, they are therefore travelling under better conditions, conditions such as to render the rest period of one hour superfluous.

35. In the event of the Court not agreeing with the answer to the first question suggested above, I propose that it reply to the second question that the rest period of at least one hour after fourteen hours of travel does not apply to animals transported by lorry loaded onto a ferry which complies with the conditions laid down in Chapter I 26(b) of the annex to Directive 91/628.

C — *The third question*

36. The description of the transport in question, given in paragraph 26 above, as transport by sea means that, as no specific provision is made for that type of transport, the general provisions on transport by sea laid down in the annex to Directive 91/628 apply.

37. It follows, first, that it is necessary to establish whether Chapter VII 48 point 7(b) of the annex to Directive 91/628, under which 'in the case of transport by sea on a regular and direct link between two geographical points of the Community by means of vehicles loaded on to vessels without unloading of the animals, the latter must be rested for 12 hours after unloading at the port of destination or in its immediate vicinity unless the journey time at sea is such that the voyage can be included in the general scheme of points 2 to 4' should have applied in the present case.

38. It certainly does not appear from the documents in the case that the journey time by sea was not entered in the route plan which, in accordance with the second indent of Article 5A point 2(d)(ii) of Directive 91/628, the staff in charge of the transport are required to have 'certified, after checking, by the competent authority of the authorised crossing point or of the point of exit designated by a Member State … after the animals have been checked and judged by the official veterinarian to be fit to continue their journey'.

39. It is therefore reasonable to suppose that Chapter VII 48 point 7(b) of the annex to Directive 91/628 does not apply in the present case but only point 7(a) of that provision, under which 'animals must not be transported by sea if the maximum journey time exceeds' eight hours, 'unless the conditions laid down in points 3 and 4, apart from journey times and rest periods, are met'.

40. In the case of transport by ferry between the port of a Member State and the port of a third country, the application of Chapter VII 48 point 7(b), at least on an interpretation based on the definition established in paragraph 26 above, must inevitably mean that a rest period of 12 hours after the animals transported by ferry arrive at the port of destination is precluded and a further period of 28 hours of transport by road may begin immediately [11] in three circumstances: first, where the transport by sea by ferry is part of the general plan for the journey contained in the abovementioned route plan; then where, as in the present case according to the statement contained on page 15 of the original text of the order for reference, the ferry meets the conditions laid down in point 3; and lastly where the measures expressly provided for in Chapter I 26(b)(i), (ii) and (iii) of the annex to Directive 91/628 and set out in paragraph 26 above have been taken (which, as indicated, cannot be excluded, since the ferry meets the conditions laid down in the abovementioned point 3).

41. On the basis of this approach, the necessity of the said rest period can be specifically precluded if, in addition to the information already given in the order for reference, information on the other two points mentioned in the preceding paragraph can also be obtained.

42. However, the order for reference expresses some doubt as to whether such an approach can be adopted in the present case, despite the fact that it concerns the transport of animals to a third country and

11 — On the contrary, in the case of transport by ferry between the ports of two Member States, the rest period of 12 hours cannot be precluded *a priori* since, even if that rest period requires cooperation with the authorities of the port of arrival, that cooperation, which is not obligatory for the authorities of third countries, is obligatory for the authorities of Member States. That is why, when transport by sea by those means exceeds the journey time laid down in Chapter VII 48 point 7(b), bovine animals must be rested for that period on arrival at the port of a Member State. Conversely, where the period of transport does not exceed that time, in principle bovine animals need not be rested and transport may begin again immediately.

a ferry crossing lasting 41 hours followed by a further journey on land of approximately 5 hours, bringing the total journey time up to 46 hours.

43. According to the referring court, its doubts arise from the fact that the answer to be inferred from a literal interpretation of the provisions in question would mean that a transport of animals by ferry between a Community port and a port in a third country was not subject to any time-limit even if the journey time was considerably more than 46 hours and the journey lasted for several days, a result that would not be consistent with the aim of protecting the animals pursued by the legislation in question.

44. These teleological doubts must be taken into account. In order to do so, attention should be paid to (a) the referring court's objection to the line of argument upheld by the Finanzgericht Hamburg in a decision delivered on 2 February 2006 which adopted that approach, and (b) to the idea, mentioned earlier, that in the case of transport between a geographical point of the Community and a geographical point situated in a third country, transport such as the transport in question might not, in theory, be subject to any time-limit.

45. As to the line of argument contested by the referring court, it consists of the view that 'the phase of transport of animals by ferry is undoubtedly to be assigned to the rest period'. [12] According to the referring court, that argument is untenable in that 'rest period' is defined in Article 2(2)(h) of Directive 91/628 as 'a continuous period in the course of a journey during which animals are not being moved by a means of transport'.

46. This complaint may not be decisive because, while the Finanzgericht Hamburg classified the period of transport of animals in vehicles loaded onto a ferry as a 'rest period', it may well have thought it was classifying as such the period relating to the transport of animals loaded directly onto vessels properly designed for their transport (a period that is certainly not to be counted in the journey time of transport first by sea and then by land). It must therefore be held that, while it used the expression in question, what it had meant to say was that the period of the former type of transport, as it had said when it classified it in the same way as the period relating to the latter type of transport, should be considered, in respect of its relevance, as *equivalent* to a rest period. That is what the Commission did in its observations before the Court when it said that transport of vehicles loaded onto ferries cannot be regarded either as transport or as a rest period within the meaning of the definitions in Directive 91/628.

12 — In taking that position — according to the order for reference — the Finanzgericht Hamburg opposed the Verwaltungsgerichtshof, Vienna, which held in a decision of 30 June 2005 that an exception to the 12-hour rest period rule could be made only if the transport by ferry did not exceed 14 hours.

47. As to the idea that, in the case of transport between a geographical point of the Community and a geographical point situated in a third country, transport such as the transport in question might not, in theory, be subject to any time-limit, its first source of weakness is immediately apparent from the fact that the referring court contradicts itself by asking the Court to determine whether, in cases where the period of transport on vehicles loaded onto ferries is immaterial, a further period of 28 hours of transport by road begins immediately after unloading the lorry at a port in a third country (which clearly indicates an admission that there is a time-limit on transport, even transport by road in a third country).

48. But in addition to this source of weakness in the idea in question, there is another more decisive factor: even if the directive does not contain any provision on transport by road in the territory of a third country, the general spirit of the system suggests that the 29-hour rule should also apply to such transport. If it were not so, the general objective of the legislation in question, which is to ensure the welfare of the animals, would be undermined.

49. It follows that in classifying the period of transport of animals on vehicles loaded onto a ferry as neutral when the conditions mentioned in paragraphs 39 to 41 above are met, there is no risk that if the transport of such animals continues immediately by land it could continue for several days without a break, since that subsequent transport can continue unconditionally only for 14 hours, after which there must be a rest period of at least 1 hour.

50. The statement at the end of the preceding paragraph is not inconsistent with the statements made earlier in paragraphs 23 and 24 above about the difficulties that would be encountered by an interpretation of Chapter VII 48 point 7(b) of the annex to Directive 91/628 which would require a transporter of animals in a vehicle loaded onto a ferry to unload the animals for a rest period of 12 hours at the port of destination in a third country, since that would entail cooperation by the authorities of that country and, in the absence of such cooperation, would face the impossibility of imposing the application of Community rules outside 'Community territory'.

51. The rest period of at least one hour prescribed in Chapter VII 48 point 4(d) would not in fact require any cooperation on the part of the authorities of such a third country since, as mentioned in paragraph 45 above, Article 2(2)(h) of Directive 91/628 defines 'rest period' as 'a continuous period in the course of a journey during which animals are not being moved by a means of transport'. This implies that giving the animals a rest period does not involve unloading.

52. I therefore propose that the Court reply to the third question that in the case of

transport by sea on a regular and direct link between a geographical point of the Community and a geographical point in a third country by means of a vehicle loaded onto a ferry without unloading of the animals, the period of such transport should be held to be immaterial provided that the animals have been regularly fed and watered, with the result that, if those conditions are met, a further period of 28 hours of transport by road may begin immediately after unloading the lorry at the port of destination.

D — *The fourth question*

53. By the fourth question, the referring court asks, on the one hand, whether 'the first indent of Article 5A point 2(d)(ii) of Directive 91/628 [is] to be understood as meaning that the staff in charge of the transport are required to state in the route plan the times at which the animals transported were fed and watered during the ferry journey' and, on the other, whether 'a pre-typed statement' indicating that during the ferry journey, 'animals are fed and watered in the evenings and mornings, at midday, and in the evenings and mornings' does not meet the requirements of Directive 91/628, with the effect in law 'that the failure to state the measures actually taken to care for the animals leads to a loss of the right to an export refund in so far as the proof required cannot be provided by any other means'.

54. It is clear from the logical order of the two points raised by the referring court that the main purpose of its question is to ascertain whether the transporter's general conduct complies with the directive — and not merely with the specific provision that is the subject of its first question — general conduct consisting not only of what was presented by way of a programme in the pre-typed statement on the route plan but also (a) the subsequent signature of the route plan by which the transporter claims to have confirmed at the end of the journey that the animals really had been given the care specified in the plan at the prescribed times and in the prescribed manner and (b) an affidavit to the same effect which, according to a statement on page 3 of the order for reference, was submitted by the person in charge of the transport and was considered by the Zollamt Salzburg, Erstattungen, to be irrelevant.

55. To reply properly to that question, understood in the terms indicated in the preceding paragraph, it is necessary to interpret Article 5A point 2(d)(ii) of Directive 91/628, in the light of the second indent of that provision, and of Article 5A point 2(d)(ii) of that directive.

56. Article 5A point 2(d)(ii) of Directive 91/628 establishes that the transporter must ensure that the staff in charge of the transport 'state in the route plan the times and places at which the animals transported *have been* fed and watered during the journey'

and Article 5A point 2(d)(i) provides that the original copy of the route plan must be 'duly *drawn up* and *completed* by the appropriate persons at the appropriate time'. [13]

57. The applicant in the main proceedings, in its written observations submitted to the Court, made the most of the distinction in the provision in question between 'drawing up' and 'completing' and the fact that it specifies that both these formalities, and therefore each of them, must be completed at the 'appropriate time'.

58. Having noted, as already stated, in point 5.2 of the order for reference that by signing the route plan at the end of the journey the transporter had confirmed that the animals really had been given the requisite care at the prearranged times, the applicant in the main proceedings claims to infer that, while the pre-typed indication in the route plan of the times when the animals were to be fed and watered represented the required 'drawing up', the subsequent signature represented the required 'completion'. It meant, clearly, that the completion effected by the signature met the requirement laid down in the provision in question by means of the connection between the signature and the pre-typed route plan. The reason being that (a) the specification that the operations in question were to be carried out 'in the evenings and mornings, at midday, and in the evenings and mornings', with the repetition of the expressions 'in the evenings and mornings' that it contained, could legitimately be understood not as a general statement but as referring to various identifiable times in the actual journey to be made which, as the documents show, lasted 41 and a half hours and therefore specifically covered 'the evening and morning, midday' and another 'evening' and 'morning', and (b) the programme set out in the route plan was so specific as to render a detailed account of its execution unnecessary and cause the end of the journey to be the 'appropriate' time to complete the statement to be included in the route plan by appending the final signature. It is clearly because it holds the view set out in the preceding two paragraphs that the applicant in the main proceedings does not invoke in its observations the possible probative value of the affidavit which point 3 in the order for reference states that it produced in vain, *ex post*, before the Zollamt Salzburg, Erstattungen.

59. The manner in which the applicant in the main proceedings might thus be deemed to have complied with the provisions of Article 5A point 2(d)(ii) of Directive 91/628 certainly does not correspond exactly to the provision contained in subparagraph (ii), according to which the transporter must ensure that 'the staff in charge of the transport state in the route plan the times and places at which the animals transported have been fed and watered during the journey', because (apart from the fact that it is not easy during transport by sea to state the 'places' at which the operations are carried out) the detailed rules which the loading

13 — My emphasis.

of the transport was presumably meant to follow cannot be regarded as apt to indicate the times at which feeding and watering took place.

60. If however, as indicated in paragraph 55 above, Article 5A point 2(d)(ii) of Directive 91/628 and the second indent of that provision are considered in conjunction with Article 5A point 2(f), it cannot be inferred from the fact that the way in which the applicant claims that it complied with point 2(d)(ii) did not correspond exactly with the terms of that provision — as, according to the order for reference (in point 3), the Zollamt Salzburg did infer — that the animals had not been fed or watered for 46 hours and that the exporter had therefore forfeited the right to the export refund.

61. Article 5A point 2(f) of Directive 91/628, which must naturally be borne in mind in the context of a systematic interpretation of the whole of point 2, provides that Member States shall ensure that the transporter 'demonstrates … that steps have been taken to meet the animals' needs for food and water during the journey, even where the route plan is changed'.

62. By that provision, the Community legislature indicated unequivocally that it did not wish to attribute absolute value to the manner in which it is demonstrated, in accordance with Article 5A point 2(d)(ii) of Directive 91/628, that the animals have been regularly fed and watered. For the Community legislature, the essential element that the transporter must furnish is actual evidence that 'the animals' needs for food and water [have been met] during the journey'.

63. To infer from the failure to comply exactly with Article 5A point 2(d)(ii) of Directive 91/628 the absolute value attributed to that provision by the Zollamt Salzburg, Erstattungen, would also conflict with the approach of assessing all the elements of fact in the particular case, including the elements supplied by the exporter, which the Court of Justice held in *Viamex Agrar Handel and ZVK*[14] to be the approach that should be followed in interpreting and applying the reference made by Article 1 and Article 5(3) of Regulation No 615/98 to Directive 91/628.

64. In the national proceedings which led to the request for that ruling, the question had been raised as to the validity of that reference, as being contrary to the principles of legal certainty and proportionality, in view of the fact that both provisions (a) make the payment of export refunds for live bovine animals subject to compliance, during the transport of the animals to the first place of unloading in the third country of final destination, with the provisions of that directive, and (b) were understood to preclude such refunds in the event of any infringement of even one of those provisions.

14 — Joined Cases C-37/06 and C-58/06 *Viamex Agrar Handel and ZVK* [2008] ECR I-69.

65. The Court replied to the questions referred to it by pointing out, first, that 'the purpose of the general reference made by Regulation No 615/98 to Directive 91/628 is to ensure … compliance with the relevant provisions of that directive on the welfare of live animals and, in particular, the protection of animals during transport' [15]; it concluded that the reference in question cannot be held to be invalid since it cannot be interpreted as covering all the provisions of Directive 91/628 and, in particular, those provisions which have no connection with the principal objective pursued by that directive. [16] Then, after recalling the character traditionally attributed to the principle of proportionality as a principle according to which 'when there is a choice between several appropriate measures, recourse must be had to the least onerous and the disadvantages caused must not be disproportionate to the aims pursued', [17] it ruled that the national authorities must apply the relevant provisions of Regulation No 615/98 in a manner that is consistent with that principle. [18]

66. The approach which the Court indicates that the national courts should follow in interpreting and applying the provisions which link the system of refunds with the protection of health of bovine animals during transport is clear. It is based on the following two criteria:

(1) to interpret provisions of the directive, designed to be taken together and in conjunction with the whole body of the act in which they are contained, by attributing differing degrees of importance to each of those provisions and to the reference made to them by Regulation No 615/98, depending on whether the direct objective of the provision is to achieve the principal aim of the directive or whether the provision has a purely instrumental function with respect to that aim, and

(2) to apply the provisions of the directive by choosing, from several ways of doing so, the way that ensures that any disadvantages that may be caused are not disproportionate to the objective which is pursued of protecting the health of the animals.

67. There is no doubt that the propositions contained in paragraphs 62-64 above represent the criteria which, as the Court specified in the judgment referred to in paragraphs 63-66 above, must be followed.

15 — Ibidem, paragraph 29.
16 — Ibidem.
17 — Ibidem, paragraph 35.
18 — Ibidem, paragraph 46.

IV — Conclusions

68. In the light of the normative data referred to above and the considerations as to their interpretation suggested by an analysis of the features of the present case and the criteria indicated in the judgment of the Court of Justice referred to in paragraphs 63-66 above, I suggest that the Court reply as follows to the questions referred by the Unabhängiger Finanzsenat for a preliminary ruling:

(1) The specific provisions of Chapter VII 48 point 7(b) of the annex to Council Directive 91/628/EEC of 19 November 1991 on the protection of animals during transport and amending Directives 90/425/EEC and 91/496/EEC, which refer exclusively to transport by ferry on a regular link between two points of the Community, cannot apply analogously to the transport of animals by roll-on/roll-off ferry to a third country.

(2) In the case of transport by sea on a regular and direct link between a geographical point of the Community and a geographical point in a third country by means of a vehicle loaded onto a ferry without unloading of the animals, the period of such transport should be held to be immaterial provided that the animals have been regularly fed and watered, with the result that, if those conditions are met, a further period of 28 hours of transport by road may begin immediately after unloading the lorry at the port of destination.

(3) The first indent of Article 5A point 2(d)(ii) of Directive 91/628/EEC does not require the staff in charge of transport by sea to state in the route plan the times

at which the animals transported were fed and watered as an essential condition for obtaining an export refund.

(4) A pre-typed statement indicating that during the ferry journey animals are fed and watered at times corresponding to sufficiently identifiable phases of the journey may meet the requirements of Directive 91/628/EEC if it is demonstrated that the operations in question were carried out at those times.

It is for the national court to determine whether the elements produced by the exporter in this connection suffice, taking into consideration, if necessary, elements outside the route plan such as an affidavit submitted after the end of the journey.